the plaintiffs have proved that exhs P1, P2, P5A-E and P6 were not genuine. He also pointed out that the plaintiffs' genuine cassettes had stickers with water marks whereas the defendant's infringing cassettes had stickers without water marks.

Having considered all the evidence and the submissions of both counsel, I was satisfied that there has been infringement of the plaintiffs' copyright in the said musical works and that the defendant has been passing off those musical works not of the plaintiffs' manufacture as those of the plaintiffs. As the defendant has been reproducing and/or disposing of unlawfully without the licence or consent of the plaintiffs, the plaintiffs' said musical works in cassettes or has otherwise caused or assisted others to reproduce and/or dispose of unlawfully without the licence or consent of the plaintiffs, the plaintiffs' said musical works in cassettes, there must necessarily be an injunction to restrain him whether by himself, his servants or agents from doing any of those acts. There must also be an order for delivery to the plaintiffs of all infringing copies of the said musical works in the form of cassettes or in other material form together with packaging, labels, invoices, bills, documents and books as are in the defendant's possession, power, custody or control. I also ordered that there be an inquiry as to damages or at the plaintiffs' option an account of profits and payment of all sums found due upon taking such inquiry or account with interest thereon, together with costs of this action.

Order accordingly.

Solicitors: *Shearn Delamore & Co*; *K Nadarajah & Partners*.

Reported by *Yap Shao Sin*

Masnelan Pakpahan v Public Prosecutor

HIGH COURT (PENANG) – CRIMINAL APPLICATION NO 44-5-89
MOHAMED DZAIDDIN J
9 MARCH 1989

Criminal Procedure – Petition of appeal – Application for leave to file appeal out of time – Delay due to sheer inadvertence – Omission of material particulars in affidavit – No proposed petition of appeal attached to application – Whether application ought to be granted – Criminal Procedure Code (FMS Cap 6), s 310

The applicant was convicted and sentenced by the magistrate's court on 30 June 1988. On 8 July 1988, his solicitors filed the notice of appeal. On 23 August and 6 December 1988, the solicitors applied to the magistrate's court for the notes of evidence. On 19 December, the court sent to the solicitors the notes of evidence and grounds of decision but as the solicitors were under the impression that documents had not been sent, they despatched a reminder to the magistrate's court. Subsequently, upon a search made in his office, it was discovered that the document had been placed in a different file and by which time the period of ten days to file the petition of appeal under s 307(iv) of the Criminal Procedure Code had expired.

The applicant then applied under s 310 of the Criminal Procedure Code for leave to file his petition of appeal out of time, claiming that the delay was due to sheer inadvertence. However, the affidavit supporting the application did not spell out material particulars about the appeal, such as the offence for which the applicant was convicted and the sentence.

Held, dismissing the application:

(1) The underlying principle of s 310 of the Criminal Procedure Code is to allow a judge to exercise his unfettered discretion to see that substantial justice may be done in the matter. In the final analysis, the exercise of the discretion depends on the facts and circumstances of each case.

(2) It is insufficient for the deponent to state that he believes there are strong grounds in the appeal on the merits and in law without at least mentioning what the grounds are and the law involved. He ought to have exhibited to his affidavit a proposed petition of appeal.

Legislation referred to
Criminal Procedure Code (FMS Cap 6) ss 307(iii), (iv), 310

Yeoh Chin Chong for the applicant/appellant.
Abdul Karim bin Abdul Jalil for the respondent.

Cur Adv Vult

Mohamed Dzaiddin J: By this notice of motion, the applicant/appellant applies under s 310 of the Criminal Procedure Code for leave to file his petition of appeal out of time and that he be allowed to proceed with the appeal against his conviction and sentence. Section 310 states:

> A judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as such Judge shall consider desirable, in order that substantial justice may be done in the matter.

The application is supported by an affidavit of Mr Teh Beng Chneah, his counsel, affirmed on 16 February 1989. Unfortunately, this affidavit did not spell out clearly the relevant materials in support of the application. On the whole, the deponent has omitted material particulars which has left me completely in the dark about the whole case. As an example, he merely deposed that he was the counsel in charge of both cases in which the applicant was convicted and sentenced by the magistrate, Balik Pulau on 30 June 1988. The title of the application mentioned about the two cases in question vide Balik Pulau Magistrate Court Arrest Cases No 92-67/86 and 92-68/86. However the particulars of the charges, ie the offence for which the applicant was convicted and the

sentence, were never mentioned in the said affidavit. Be that as it may, I proceeded to hear this application based on the available facts in the said affidavit, which facts are as follows. The applicant was convicted and sentenced on 30 June 1988. On 8 July 1988, his solicitors filed the notice of appeal. On 23 August 1988 and 6 December 1988, the solicitors applied to the magistrate's court, Balik Pulau for the notes of evidence. On 19 December 1988, the court sent to the solicitors the said notes of evidence and grounds of decision. Here, it is conceded by the deponent that on 19 December 1988 the magistrate's court, Balik Pulau, sent his office the notes of evidence and grounds of decision. However, as he had laboured under the impression that the document had not been sent to him, on 7 January 1989 he despatched a reminder to the magistrate's court, Balik Pulau. He had also instructed one of his staff to go to the Balik Pulau court to collect the notes of evidence and the grounds. There, it was found out that the notes of evidence and grounds of decision were sent on 19 December 1988. Upon a search made in his office it was discovered that the document had been placed in a different file and by which time the period of ten days to file the petition of appeal under s 307(iv) had expired. Paragraphs (iii) and (iv) of s 307 state:

> (iii) When a notice of appeal has been lodged the Court appealed from shall make a signed copy of the grounds of decision in the case and cause the same to be served upon the appellant or his advocate by leaving the said copy at the address mentioned in the notice of appeal or by posting it by registered post addressed to the appellant at the said address.
>
> (iv) Within ten days after the copy of the grounds of decision has been served as in the last preceding subsection provided, the appellant shall lodge with the clerk of the Magistrate's court at which the trial was held a petition of appeal in triplicate addressed to the High Court.

In short, the deponent claimed that the delay was due to sheer inadvertence. Hence, by the time this motion was filed on 18 February 1989, the applicant was about 46 days out of time.

In my opinion, the underlying principle of s 310 of the Criminal Procedure Code is to allow a judge to exercise his unfettered discretion to see that substantial justice may be done in the matter. In the final analysis, the exercise of the discretion depends on the facts and circumstances of each case. In the present application, it is deposed that there are strong grounds of appeal on the merits and in law and that the failure of the solicitors to file the petition of appeal in time was due to inadvertence. In my judgment, it is insufficient for the deponent to state that he believes there are strong grounds in the appeal on the merits and in law without at least mentioning what the grounds are and the law involved. He ought to have exhibited to his affidavit a proposed petition of appeal. Needless to say, I would have been persuaded to grant the application if there was before me materials such as a proposed petition of appeal to enable me to consider the grounds.

For the above reasons, I am quite satisfied that the stated grounds in the affidavit are not such as to persuade me to exercise my discretion in favour of granting the application. Accordingly I dismiss this application.

Application dismissed.

Solicitors: *BC Teh & Cheah.*

Reported by *Ng Sheau Jiuan*

Malaysia Credit Finance Bhd v Yap Hock Choon & Anor

HIGH COURT (IPOH) – ORIGINATING SUMMONS NO 31-13-86
PEH SWEE CHIN J
28 FEBRUARY 1989

Land Law – Application for an order of possession by chargees – Service of Form 16K on chargors – Pending appeal in Supreme Court against sale by private treaty – Pending appeal not relevant to present application – Chargors in occupation of land – Whether remedy of possession could be had against chargors in occupation – National Land Code 1965, ss 270, 271 & 272

This was an application for an order of possession by the plaintiff against the defendants in respect of a piece of land together with a building thereon ('the said land'), under s 271(1)(b) of the National Land Code ('the Code'). The plaintiff ('the chargee') was the chargee of the said land over which the defendants ('the chargors') had created a charge. Before the present application, there was a previous similar application by the chargee for an order of possession. One of the chargors filed a counter application for a stay of all further proceedings or execution. They were dealt with together by the court. The court had held in the earlier application of both parties that since Form 16K had not been served, the application by the chargee for the order of possession should be dismissed and that the counter application for stay of proceedings should also be dismissed. Before the present application, the chargee had taken steps to serve both the chargors with the Form 16K. The court was informed that a memorandum of transfer of the said land sold to a purchaser by private treaty had not been signed, pending the result of the present application. The present application was not countered by an application from the chargors for stay of proceedings or execution this time. The chargors put forward the following arguments:

(a) There is a pending appeal in the Supreme Court in respect of an order of sale by private treaty.
(b) That an earlier similar application for the order of possession had been dismissed by the court and that this present application was wrong, as there should have been an appeal also against the dismissal of the previous application of the chargee.